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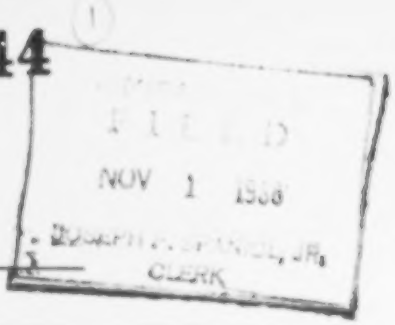

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

MARK TURNER, IV,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARVIN D. MILLER
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QUESTION PRESENTED

I.

Is it consistent with the principles of fairness and due process of law under the Fifth Amendment to allow Petitioner to suffer a conviction for a crime he did not commit because an appeals court chose not to consider the application of Rule 52 of the Federal Rules of Criminal Procedure.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The unpublished opinion of the court of appeals is found in Record Opinion No. 88-5010 decided 4 August 1988. (App. A) The decision denying a petition and suggestion for rehearing or rehearing en banc is an unpublished summary denial decided on 2 September 1988.

JURISDICTION

The final judgment of the court of appeals was entered on 2 September 1988. The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254 and 2101.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the United States Constitution reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a grand jury except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

I. STATEMENT

This case concerns the Fourth Circuit Court of Appeals' refusal to consider and apply Rule 52 of the Federal Rules of Criminal Procedure to the case

sub judice. The result was the sustaining of the wrongful conviction of your Petitioner for a crime he did not commit.

Mark Turner was wrongly convicted for making a false statement to deputy United States Marshals in violation of 18 U.S.C. 1001. The Marshals, reinforced by local police, had come to Mark Turner's home looking for a supposed "fugitive".[1] When they did not find the "fugitive", they told Mr. Turner that not cooperating with them and helping the "fugitive" would expose him to federal prosecution. Mark Turner denied having seen the "fugitive". He was later charged, convicted and appealed.

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[1] This "fugitive", was only under a federal court order suspending imposition of a previously declared sentence. No warrants were outstanding. The suspended imposition was revoked about one month later, a warrant issued, and an arrest was made.

During the pendency of his appeal to the Fourth Circuit, it joined other circuits and adopted a doctrine known as the exculpatory no. Exculpatory denials such as Mr. Turner's statement are not a crime according to that doctrine. See United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988).

Both the prosecution's and your Petitioner's reply briefs focused on the application to the case sub judice of the opinion in Cogdell, supra.

Application of the doctrine of the exculpatory no established that Mark Turner did not violate 18 U.S.C. 1001. That doctrine, as adopted in Cogdell, has five criteria. These criteria are:

1. that the statement was not made pursuant to a claim to a privilege or a claim against the government, (it was not);

2. that it was made in response to inquiries initiated by a federal agency or department, (it was);

3. that it did not pervert the basic functions entrusted by law to the agency as that term has been defined in the doctrine, (it did not);[2]

4. that it was made in the context of an investigation rather than a routine exercise of an administrative responsibility, (it was); and,

5. that it was made in a situation in which a truthful answer could have

---

[2] According to Cogdell, a false exculpatory denial made in response to a question initiated by a criminal investigator does not pervert the agency's function. The Fourth Circuit, as have other circuits, recognized that trained investigators expect to receive false answers to their inquiries and are not perverted in their function when that happens. Cogdell, supra, at 183. Trained investigators are not put off by false exculpatory denials such as "who me, I don't know anything".

incriminated the declarant, (it would have).

At oral argument the prosecution sought to sidestep the fact that Mark Turner was not guilty. They raised an issue which had not previously been plead. They argued that the Appellant could not rely on the exculpatory no because it had not been expressly included in his motion for a judgment of acquittal at trial.

A motion for judgment of acquittal, however, necessarily encompasses the issue of the failure of the prosecution to prove its case. It follows, therefore, that the failure of the evidence to prove a crime was preserved even if the supporting theory of the exculpatory no was not expressly stated.

Counsel for your Petitioner also pointed out to the appeal panel that the

issue of the exculpatory no had to be considered because of the plain error doctrine codified in Rule 52(b) of the Federal Rules of Criminal Procedure. When, as here, the prosecution's evidence does not prove a crime, it is plain error to allow the conviction to stand. Rule 52(b) exists so that courts can consider and correct such errors, even if not raised at trial. United States v. Dawlett, 787 F.2d 771, (1st Cir. 1986).

The appeal panel in the case sub judice, disregarded Rule 52(b) of the Criminal Rules and reached out to a civil case to achieve its result. In that civil case, United States v. One 1971 Mercedes Benz, 542 F.2d 912, (4th Cir. 1976), the issue of property value was not raied at trial and was not allowed on appeal. The appeal panel applied the principle of that civil case to the case

sub judice and ignored Criminal Rule 52(b) and its plain error doctrine.

Failure of the evidence to prove a crime is never harmless; it is plain error. It affects a substantial right. Clyatt v. United States, 97 U.S. 207 (1905).[3] By failing to consider the application of Rule 52(b) the appeals court allowed a conviction to stand in a case in which the evidence did not prove a crime.

II. THE OPINION OF THE LOWER COURT

The decision below arose from a direct appeal by Petitioner of an 18 U.S.C. 1001 conviction in the District Court for the Eastern District of Virginia to the Fourth Circuit Court of Appeals.

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[3] If the exculpatory no applies to the case sub judice, and it does, then there was no crime. Cogdell, supra; Bush v. United States, 503 F.2d 813 (5th Cir. 1974).

The issue framed by both parties in the appeal briefs concerned whether or not the evidence, when measured against the doctrine known as the exculpatory no, could sustain Mr. Turner's conviction.

During oral argument, the prosecution interjected a new issue into the case. They claimed that even if Mr. Turner was not guilty because his statement was an exculpatory denial, his conviction should, nonetheless, not be overturned. Petitioner's counsel had not included the exculpatory no in his motion for a judgment of acquittal at trial.

Petitioner's counsel urged the court not to consider the prosecution's argument since it had not been briefed or otherwise raised. Interjecting new issues at oral argument violated Rule 28 of the

Federal Rules of Appellate Procedure.[4]

The court was urged to consider the issue of the exculpatory no under the plain error doctrine of Rule 52(b). Failure of the evidence to prove a crime has never been considered harmles error; it is plain error. Clyatt, supra. Plain error can always be considered on appeal regardless of whether the issue was raised in the trial court.[5] The panel ignored the plain error doctrine and refused to

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[4] If the prosecution thought that the exculpatory no could not be raised on appeal then, under Rule 28, they should have said so in their brief or via appropriate motion under Appellate Rule 27.

[5] In fact, when adopting the exculpatory no in Cogdell, supra, the Fourth Circuit relied on a case from the Fifth Circuit in which that very same issue was not raised at trial or in the appeal briefs; yet, the Fifth Circuit overturned the conviction because the exculpatory no applied to its case. It would have been manifestly unjust to allow the conviction to stand. See United States v. Bush, supra.

consider the application of Rule 52(b) of the Federal Rules of Criminal Procedure.

In their opinion, the panel said that regardless of the merits of the application of the doctrine of the exculpatory no to Mr. Turner's case, they would not consider it since it had not been expressly raised in the court below.

A Petition and suggestion for rehearing and/or rehearing en banc was denied on 2 September 1988.

III. REASONS FOR GRANTING THIS WRIT.

A. The Court Of Appeals Was Not Free To Ignore The Application Of Rule 52 Of The Federal Rules Of Criminal Procedure.

Rule 52 is a practical rule promulgated to achieve two important goals. These goals are to protect an accused from being harmed by a substantial error which might not have

been properly presented in a lower court and, at the same time, prevent the wholesale reversal of convictions for insignificant, harmless errors. Steele v. United States, 243 F.2d 712 (5th Cir. 1957), cert. denied 355 U.S. 828, rehearing denied, 355 U.S. 875 (1958). The Rule achieves substantial justice and avoids hypertechnical rigidity.

Subsection (a) of Rule 52 prevents courts from being required to overturn a conviction for technical errors that have no substantial impact on the case. It is the embodiment of the harmless error doctrine. On the other hand, subsection (b) exists to prevent rigid application of technical principles from denying an individual a substantial right. The rule expressly states that:

> "Plain errors or defects affecting substantial rights may be noticed although they

were not brought to the attention of the Court."

Most circuits apply Rule 52(b) to overturn a conviction when the evidence does not prove a crime. See e.g., United States v. Golomb, 811 F.2d 787 (2nd Cir. 1987). In Golomb the failure of the government to prove a crime was not raised at trial; was not raised in the first appeal; and was not raised until a second appeal. Even though raised for the first time in a second appeal, the conviction did not stand. The prosecution had not proved a crime and justice required that the conviction be overturned. See accord United States v. Dawlett, supra, which held that "...our concept of justice is violated when a man is convicted of a crime he did not commit." Id. at 775, 776. The failure of the evidence to establish a crime was also

considered for the first time on appeal in Dawlett.

Prior to this case the Fourth Circuit allowed an accused to raise the issue of the failure of the evidence to prove a crime on appeal even if there was no motion for a judgment of acquittal. See e.g. Lockhart v. United States, 183 F.2d 265 (4th Cir. 1950).

As this Court noted in Clyatt v. United States, supra at 222:

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved ... Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

See also Carr v. United States, 278 F.2d 702 (6th Cir. 1980) (failure of the government to prove a crime considered on

appeal even though not raised at trial); United States v. Zweig, 467 F.2d 1217 (7th Cir. 1972) (court, in the interest of justice, reviews issue not raised at trial, i.e. the prosecution did not prove a crime); United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971) (the integrity and public reputation of judicial proceedings suffer when a reviewing court refuses to notice to whether or not the accused has committed a crime); Smith v. United States, 173 F.2d 181 (9th Cir. 1949) (conviction on insufficient evidence amounts to a manifest miscarriage of justice which must be corrected by an appellate court even if not raised at trial); United States v. Renee Ice Cream, 160 F.2d 353 (3rd Cir. 1947) (courts are compelled to examine sufficiency of evidence even when the defendant did not move for a verdict of acquittal.

If our society is to be a society governed by the rule of law and is to maintain the confidence of the people in its fairness, then appellate courts cannot, as did the Fourth Circuit in the case sub judice, fail to consider such fundamental errors as the failure of the government to prove a crime. Appellate courts are bound to consider error which is apparent on the face of the record and which rises to the level of a plain or fundamental error even when no objection is made at trial. United States v. Garber, 471 F.2d 212, (5th Cir. 1972).

B. Rule 52(b) Of The Federal Rules Of Criminal Procedure Is Intended To Protect Individuals Such As Your Petitioner From Conviction When, As Here, They Did Not Commit A Crime.

It is clear that throughout our history we have been loathe to suffer the

conviction of an innocent man. Indeed, the very independence of the judiciary was devised, in large part, to protect us from such harm. Rule 52(b) of the Federal Rules of Criminal Procedure is the embodiment of our nation's commitment to the principle that procedural rigidity not be an impediment which bars relief for the innocent.

Had the appeal panel in the case sub judice considered and applied Rule 52(b) rather than a civil case, Mr. Turner's conviction for a crime he did not commit would not have been sustained.

It is clear that the doctrine of the exculpatory denial, or as it is commonly known, the exculpatory no, when applied to the facts of this case, requires the same result as that achieved by the Fifth Circuit in United States v.Bush, supra; by the Ninth Circuit in

United States v. Medina de Perez, 799 F.2d 540 (9th Cir. 1986); and by the Fourth Circuit in Cogdell. That result is the overturning of the conviction.

The five point test which the Fourth Circuit adopted in Cogdell from Medina de Perez, supra, establishes that Mr. Turner committed no crime. The undisputed facts establish that his statement was, (1) not made in pursuit of a claim against an agency or the government; (2) was made in response to inquiries initiated by federal agents; (3) did not pervert the basic functions entrusted by law to the agency; (4) was made in the context of an investigation rather than a routine exercise of administrative responsibility; and (5) was made in a situation in which a

truthful answer would have incriminated the declarant.[6]

Since the exculpatory no applies to the case sub judice, Mr. Turner committed no crime when he gave the agents his exculpatory denial. United States v. Bush, supra, at 814. 18 U.S.C. 1001 was not intended to embrace oral, unsworn

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[6] As has been indicated in footnote 2 above, a false exculpatory denial does not pervert an investigator's basic functions in a manner that 18 U.S.C. 1001 was intended to combat. It is "...one of the ordinary obstacles confronted in a criminal investigation." Cogdell at 184. See also Medina de Perez, supra, at 546. Application of this criteria is proper in the case sub judice because the agents told Mr. Turner, when he gave his exculpatory denial, that if he did not help them apprehend their "fugitive", that he would be subject to prosecution.

It is equally clear that had Mr. Turner not given the agents an exculpatory denial, he might well have incriminated himself. A statement can reasonably be considered by the declarant to be incriminatory if it is reasonably believed that it might furnish a link in a chain of evidence needed to prosecute the declarant for a federal crime. Hoffman v. United States 341 U.S. 479, 486 (1951).

statements which were not related to any claim by the declarant to a privilege of the United States or to a claim against the United States and which were given in inquiries initiated by the government. United States v. Bedore, 455 F.2d 1100, 1111 (9th Cir. 1972). See also United States v. Starke, 131 F.Supp. 190, 205-206 (D. Md. 1955) and Cogdell, supra.

Indeed, as one member of the panel in the case sub judice stated at oral argument, the facts of this case are more compelling for the application of the doctrine of the exculpatory no than are the facts in the case in which the circuit adopted that doctrine.[7]

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[7] In Cogdell, supra, the defendant had received a government check, cashed it, denied having received it, applied for and received a new check, and cashed it as well. The defendant, under questioning by federal agents, denied having received or cashed the first check. She was, in essence, lying in a claim against the government. Those facts notwithstanding,

It is a manifest injustice to allow Mark Turner to suffer a conviction for violating 18 U.S.C. 1001 because the appeals court would not consider the application of Rule 52(b) to his case.[8]

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however, Ms. Cogdell's conviction was overturned by the Fourth Circuit because of the exculpatory no.

Mr. Turner, on the other hand, made no claim against the government; was approached by federal agents; was asked about a supposed "fugitive"; was told that if he did not cooperate he faced prosecution; and under that threat gave an exculpatory denial. Mr. Turner, however, stands convicted, while Ms. Cogdell, received an acquittal.

[8] In Bush, as in Cogdell, and, most significantly unlike Turner, the accused was suspected of being involved in activites which defrauded the United States of money. That sort of conduct, is the very conduct against which 18 U.S.C. 1001 was originally directed; yet, Bush and Cogdell, went free while Mr. Turner, who never made a false claim against the United States or sought to receive anything of value from the United States, has his conviction sustained. This is not only contrary to the doctrine of the exculpatory no as adopted by the Fourth Circuit but is also contrary to the express intent of 18 U.S.C. 1001 and its legislative history. See Bush, supra at 814, 815.

See e.g. Bush, supra; Golomb, supra; Lockhart, supra; Dawlett, supra; Carr, supra; and United States v. Zweig, 467 F.2d 1217 (7th Cir. 1972). This is the precise evil at which Rule 52(b) was directed. Had the Appeals Court in this case complied with Congressional intent and considered the application of Rule 52(b), Mr. Turner would not suffer conviction of a crime he did not commit.

C. The Prosecution Waived Any Objection To Consideration Of The Exculpatory No In The Case Sub Judice.

As has been indicated above, the prosecution interjected a new issue into the appeal at oral argument. This issue had not been briefed and was not the subject of a prosecution motion or any other pleading. It was an attempt to gloss over Rule 52(b) and the plain error doctrine. The prosectuion's position was

that the manifest injustice of an unwarranted conviction took second place to technical, procedural rigidity.

The prosecution's position was ironic. It rested on a technically rigid position, the application of which also barred them from raising a new issue at oral argument.

Rule 28 of the Federal Rules of Appellate Procedure provides in subsection (a)(2), that the appellant shall set forth "...the issues presented for review."

Your Petitioner, in his brief below, framed the exculpatory no as the issue to be presented for review. The prosecution did not oppose or object to that issue. In fact, the prosecution dedicated the largest portion of its brief to the merits of the exculpatory no as applied to the case sub judice. Had the prosecution found that issue to be inappropriate,

then, in their brief, they should have availed themselves of Rule 28(b) which permits them to provide their own statement of the issues on appeal. Additionally, the prosecution also had the option of filing a motion in the appeals court seeking to dismiss the appeal. See Rule 27 Federal Rules of Appellate Procedure, and United States v. Scott, 784 F.2d 787 (7th Cir. 1986).

New issues may not be raised on appeal if they are not presented in the opening briefs. Even new issues included in a reply brief cannot to be considered on appeal. Scott at 789 n.1 [citing Christmas v. Sanders, 759 F.2d 1284, 1292, (7th Cir. 1985)]. See also United States v. Benz, 740 F.2d 903 (11th Cir. 1984) which held that issues and/ or arguments raised for the first time in a reply brief

are not properly before a reviewing court. Id. at 916. (citations omitted).

Under the prevailing case law and the Rules of Appellate Procedure, the prosecution could not interject on appeal, at oral argument, their new claim that the appeals court should ignore the plain error doctrine and the appellant's innocence because a technically rigid application of the rules barred the issue.[9] Avoiding an unjust conviction is more important than strict adherence to procedural technicalities.

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[9] The motion for a judgment of acquittal preserved the issue of the exculpatory no in the trial court. It necessarily addressed the sufficiency of the government's evidence. See, Rule 29(a) of the Federal Rules of Criminal Procedure. Your Petitioner need not raise every single legal theory in his motion in order to preserve the issue. The exculpatory no is an issue relating to sufficiency of the evidence. Bush, supra; Cogdell, supra.

CONCLUSION

The decision of the lower court represents a marked departure from established precedent and our historical respect for the rights of the innocent. Clearly, Mark Turner is not guilty of the charge for which he stands convicted. His exculpatory denial falls squarely within the confines of the doctrine of the exculpatory no as adopted by the lower court. Accordingly, he committed no crime.

The lower court was empowered to examine this case and correct this unjust conviction under the plain error doctrine as codified in Rule 52 of the Federal Rules of Criminal Procedure. With this power also comes the responsibility of giving due consideration to whether or not the power should be exercised. A lower court cannot be free to ignore Rule

52 and thereby avoid correcting a manifest injustice. The rules of practice and procedure should not be turned from a means and method to achieve justice to a means and method to deny justice.

As this Court cogently noted in Hormel v. Helvering, 313 U.S. 552, 557 (1941):

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. Orderly rules of procedure do not require sacrifices of the rules of fundamental justice."

Our legal system cannot function without the respect and support of the people. The people can neither respect nor support a system which allows an

innocent man to be convicted for a crime he did not commit because an appeals court chose not to consider the application of Rule 52 of the Federal Rules of Criminal Procedure.

For the reasons stated, this Court is asked to grant the Writ prayed in this Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-5010

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARK TURNER, IV

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (CR-87-236-A)

Argued: July 14, 1988
Decided: August 4, 1988

Before CHAPMAN, WILKINSON and WILKINS, Circuit Judges.

Marvin David Miller for Appellant. Robert L. Cunningham, Special Assistant, United States Attorney, (Henry E. Hudson, United States Attorney, on brief) for Appellee.

PER CURIUM:

Mark Turner appeals his conviction of making a false statement to a Deputy United States Marshal in violation of 18 U.S.C.A. § 1001 (West 1976). We affirm.

In late July 1987 while in the course of an investigation of a fugitive, Deputy United States Marshals were led to Turner's residence. When asked by the deputy marshals if he had seen the fugitive, Turner stated that he had not seen him since January. On August 17, 1987, the fugitive was apprehended when exiting from a hotel elevator in the company of Turner. Turner was indicted and tried on several counts: (1) assisting a fugitive in order to prevent his apprehension and punishment in violation of 18 U.S.C.A. § 3 (west 1969 & Supp. 1988); (2) harboring and concealing a fugitive in violation of 18 U.S.C.A. § 1071 (West 1976); and (3) making a false

statement to a Deputy United States Marshal in violation of 18 U.S.C.A. § 1001. The court dismissed the count alleging a violation of 18 U.S.C.A. § 1071 and the jury acquitted Turner of the charge under 18 U.S.C.A. § 3. However, Turner was found guilty of violating section 1001.

Though he concedes that the statement he made to the deputy marshals was false, Turner contends that he was improperly convicted because his response to the deputy marshals constituted an "exculpatory no." This doctrine was first recognized in United States v. Stark, 131 F. Supp. 190 (D. Md. 1955), and has been recently adopted by this circuit in United States v. Cogdell, 844 F.2d 179 (4th Cir. 1988. Whatever the merits of Turner's contention on this issue, we refuse to address it because it was not properly raised before the district court. United

States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912, 915 (4th Cir. 1976). Turner's remaining assertion of error is without merit and does not warrant discussion.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-5010

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

MARK TURNER, IV

Defendant - Appellant.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

ORDER

The appellant's petition for rehearing and suggestion for rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing en banc, and

As the panel considered the petition

for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

ENTERED at the direction of Judge Wilkins, with the concordance of Judge Chapman and Judge Wilkinson for the Court.

For the Court - By Direction

JOHN M. GREACEN
Clerk

FILED: 2 September 1988

APPENDIX C

RULE 52. Harmless Error and Plain Error.

(a) **Harmless Error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain Error.** Plain errors or defects affecting substantial rights may be notices although they were not brought to the attention of the court.

APPENDIX D

RULE 28. Briefs.

(a) Brief of the Appellant. The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(2) A statement of the issues presented for review.

(b) Brief of the Appellee. The brief of the appellee shall conform to the requirements of subdivision (a)(1)-(4), except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

APPENDIX E

§ 1001. Statements or entries generally.

Whoever, in any matter withint he jurisdiciton of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or represenations ... shall be fined not more than $10,000 or imprisoned not more than five years, or both.